2003

State of Utah v. Ivan Larsen : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	
	:	Case No. 20031033-CA
vs.	:	
IVAN LARSEN, Defendant/Appellant.	:	(Incarcerated)

REPLY BRIEF OF APPELLANT

AN APPEAL FROM A CONVICTION FOR AGGRAVATED SEXUAL ABUSE OF A CHILD, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-404.1(3) (1999), IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH, GRAND COUNTY, THE HONORABLE LYLE R. ANDERSON PRESIDING

K. Andrew Fitzgerald
Office of the Public Defender
55 E. 100 S.
Moab, UT 84532
Telephone (435) 259-0119

Counsel for Appellant

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. BOX 140854
Salt Lake City, UT 84114-0854
Telephone (801) 366-0180

Counsel for Appellee

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JEFFREY S. GRAY (5852)
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UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. BOX 140854
Salt Lake City, UT 84114-0854
Telephone (801) 366-0180

Counsel for Appellee

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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENTS

Appellant maintains all positions as they were originally set forth in his opening brief. Appellant responds to the State's brief as follows.

The prosecutor's comments were improper because they were prefaced with language that asserts the prosecutor's personal opinion or knowledge concerning core issues of the case. Hence, the jury was exposed to matters they would not be justified in hearing in determining their verdict.

Also, the improper comments probably influenced the jury's verdict due to their prejudicial nature.

ARGUMENT

1. THE PROSECUTOR'S COMMENTS IN THE OPENING AND CLOSING STATEMNT CONSTITUTE PROSECUTORIAL MISCONDUCT AND PREJUDICED THE JURY IN REACHING A VERDICT.

First Statement or Opening Statement

The prosecutor's use of the term "I think" during the prosecutor's opening statement was improper and prejudicial because it asserts the prosecutor's personal knowledge and opinion and goes to the weight of the evidence. "I think our evidence is strong and will – and – you will be convinced and I will ask you to convict." Tr. 51:10-12. In *State v. Dibello*, 780 P.2d 1221, 1226 (1989) the court clearly stated "[t]he assertion of personal knowledge or opinion about the facts by counsel is improper," when the prosecutor repeatedly prefaced his statements with "I think."

In response to this assertion, the state simply ignores *Dibello* by not addressing it, and asserts that the statement at issue is merely an overview of the case to be presented and concludes that the statement is argumentative at best. Clearly, the prosecution can give the jury an overview of the facts and evidence to be presented and perhaps the prosecutor's statement was argumentative. However, the prosecutor can not preface that overview of the case with the statement of "I think," and dually comment on the weight of the evidence by stating the evidence is strong.

In essence, the prosecutor's comment goes beyond a mere overview of the case to be presented and becomes an assertion of personal knowledge and opinion deemed improper and prejudicial by Utah courts.

Second Statement or The Mother's Competency as a Mother

Again, regarding the prosecutor's use of the terms "I think," and "in my opinion," the State attempts to minimize the prejudicial and improper effect of the comments. The statement at issue is provided as follows.

> [I]n my opinion – and I guess everybody has a different opinion about what somebody says, but a mother who keeps track of a child knows when they're at

> the neighbor's house, knows who they're playing with, checks on 'em every half an hour or so is, to me, being fairly responsible. I don't think that Barbara Butterfield could have done anything, could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that."
>
> Tr. 145:2-10.

First, the State fails to acknowledge the clear precedence of *Dibello*. Secondly, the State asserts that the prosecutor did not suggest that he had personal knowledge of the abuse and again argues that the prosecutor was merely drawing a permissible deduction from the evidence. Clearly, the prosecutor did not say, "I personally know that abuse took place." And hypothetically, the prosecutor was drawing a permissible deduction from the evidence. However, the statements were prefaced with "in my opinion" and "I don't think." Therefore, the statements made by the prosecutor become more than mere deductions, and become personal opinions and personal knowledge. In essence, a statement that is relatively benign becomes authoritative and a personal opinion when prefaced with "I think" or "in my opinion."

In fact, as previously stated, the comment "I don't think that Barbara Butterfield could have done anything, could have recognized before the fact that her husband was going to abuse her daughter and could have saved her from that," is not a benign statement simply about whether or not Barbara Butterfield was a competent mother, but is a comment infused with prosecutor's personal knowledge as to the ultimate issue of the case . . . the defendant's guilt.

Thus, the use of the terms "I think" and "in my opinion", infuse the prosecutor's closing argument with statements of personal knowledge and personal opinion. The result is that the prosecutor was not commenting on the weather, but on the defendant's

guilt. Hence, the jurors' attention was called to matters they were not justified in considering in determining their verdict and were probably influenced by those matters.

Third Statement or The Mother's Testimony

During closing argument, the prosecutor refers to the defense's cross-examination of Barbara Butterfield. "Ah, counsel tried to get Mz. Butterfield to admit things. He said, "Now didn't – isn't this what she – isn't this what, ah, Amber said in this? Isn't this what she said?" That's not what I remember."' Tr. 145:12-15.

The State claims that this statement is a paraphrase of Barbara Butterfield's testimony and hence is proper. Indeed, the prosecutor very well may have been paraphrasing. However, the paraphrasing was followed by "That's not what I remember." Again, the State attempts to minimize the effect of the language used by the prosecutor. Here the prosecutor uses the first person "I" to suggest that a piece of evidence or fact did not happen. On its face, the use of "I" is problematic, further compounded when the statement becomes one of creating a false impression or an impression of the personal knowledge of the prosecutor.

In essence, the prosecutor's statement was proper until concluded with a personal opinion as to what the prosecutor personally recalled.

Fourth Comment or Medical Evidence

Furthermore, during closing argument, the prosecutor made the following comment.

> Medical evidence. Ladies and gentlemen, that's gonna come under the category that I said of some of these other things. Maybe you're wondering why there's no medical evidence. But – but if there are medical reports in that file that talk about this thing, it's just as easy for the defense to subpoena those witnesses as it is for the prosecution. If I don't feel that kind of evidence is gonna help you in our decision, then I don't subpoena that witness. Tr. 146:16-23.

> Now why would medical evidence possibly not help in a decision? If we have a Medical Examiner take a look at a little girl and they say, "We've examined this girl and we can't either affirm or preclude what her statements are. We can't say yes or no," then that doesn't really help you, does it? Get somebody down here from Salt Lake City to tell you, "We can't say yes or no," means you know what? Tr. 146:24-25 & 147:1-5.
>
> Let me make another point. If I get a rape victim that was raped yesterday and we have her examined, then what we have is things like cuts, bruises, swelling so forth. If this person was abused two weeks ago and they examined her, then maybe they say, "You know what? The opening's consistent with having been penetrated, but we can't – there's not bruising. We can't say that he did it. We can't say that it was done by an arrow. Tr. 147:6-13
>
> So why do they want you to think about medical evidence, ladies and gentlemen? And if we're gonna raise a reasonable doubt about that, ladies and gentlemen, it's supposed to be something more than fancy imagination or wholly speculative possibility. You don't have any medical evidence supports the fact that this girl wasn't abused. Tr. 147: 14-19.

Concerning these comments, the State relies on *State v. Hales*, 652 P.2d 1290, 1291 (Utah 1982) *citing State v. Kazda*, 540 P.2e 949, 951 (Utah 1975) and argues that "A prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or the lack thereof, including reference to the paucity or absence of evidence adduced by the defense." Standing alone, the Appellant does not dispute this notion.[1] However, *Hales* offers no further elaboration or application of the principle.

> In contrast, in *State v. Kazda,* 540 P.2d at 951, the court elaborates and states that
>
> [t]he other side of this proposition is: that the prosecutor, and the public, whose interest he represents, should and does have a right to argue the case upon the basis of the total picture shown by the evidence or the lack thereof. If either counsel cannot voice a challenge to the effect of the total evidence, then one is made to wonder, what may he talk about? It is our opinion that it is not only the prerogative, but the duty of either counsel, to analyze all aspects of the evidence; and this should include any pertinent statements or deductions reasonably to be

[1] It is important to note that *Kazda* and *Hales* are cases where the primary issue before the court was whether the prosecutor's comments to the jury that the defendant failed to testify violated the defendant's privilege against self-incrimination.

> drawn therefrom as to what the evidence is or is not, and what it does or does not show.

The State correctly states that it was counsel for the defendant that brought up the issue of no medical evidence and that the prosecutor responded to defense counsel's closing argument.[2] Defense counsel's argument concerning lack of medical evidence appears consistent with *Kazda* because defense counsel is pointing out lack of evidence. However, a full reading of the prosecutor's statements concerning the medical evidence reveals that the prosecutor went beyond giving the jury a total picture of the case to presenting, for the first time, medical evidence.

Comment Five & Six

> Finally, the prosecutor concluded closing argument with the comments
>
> If you have had a doubt raised, you have to be able to say to yourself, "How is that – have I had some kind of a doubt draw into this thing, based upon itself evidence that I heard?" I say that you haven't ladies and gentlemen."' Tr. 22-25.
>
> Ah, my belief is that the evidence in this case from Amber Larsen, from all of her statements, from her interviews is –overwhelming. The elements of this case have been met." Tr. 149:2-5.

The State cites numerous cases to contest the simple reading of these comments. And yet, the State's own case, *State v. Bakalov*, 979 P.2d 799, 817 (Utah 1999) concludes that "it is true that a prosecutor engages in misconduct when he or she expresses personal opinion or asserts personal knowledge of the facts." Specifically, the prosecutor states in the case at hand, "Ah, my belief is that the evidence in this case . . . is overwhelming." Tr. 149:2-5 and "I say that you haven't ladies" when referring to whether or not there is reasonable doubt. Thus, clearly, the prosecutor, as an authority figure is expressing his

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[2] The State cites *State v Bakalov*, 979 P.2d 799 (1999), where the court reasoned that comments made by the prosecutor were not improper because they did not convey the prosecutor's personal belief.

own personal opinion or knowledge as it relates to the facts and the ultimate conclusions.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Appellant's conviction be reversed.

RESPECTFULLY SUBMITTED this 9th, day of December, 2004.

K. ANDREW FITZGERALD
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, this 9th day of December 2004 to:

Jeffrey S. Gray
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Law Office of K. Andrew Fitzgerald